Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)

CASE NO: **1981/2015**
DATE HEARD: **26/11/2015**
DATE DELIVERED: **04/12/2015**

In the matter between:

SCHOOL GOVERNING BODY: NORTHERN CAPE	1st Applicant
NORTHERN CAPE HIGH SCHOOL, KIMBERLEY	2nd Applicant
ANNELIE FOURIE	3rd Applicant
KAREN RHEEDER	4th Applicant
CARMEN TAYLOR	5th Applicant
MILTON VAN HEERDEN	6th Applicant
WINNIFRED VAN WYK	7th Applicant
LUKE AIYER	8th Applicant
MELANIE CLARKE	9th Applicant
PETRUS DU TOIT	10th Applicant
MOGAMAT FREDERICKS	11th Applicant
CHARLES HENDRICKS	12th Applicant
MZIMKHULU JELE	13th Applicant
SALMON ROBERTS	14th Applicant
PETER MAMABOLO	15th Applicant
ALDRIN MASDOLL	16th Applicant
BENEDICT MODISE	17th Applicant
VINCENT NOSI	18th Applicant

MKULULEKO NQUMASHE	19th Applicant
MARILDIA PANKER	20th Applicant
THUBEKA TAWO	21st Applicant
ELTONJON TOPKIN	22nd Applicant
FAIZA VAN DER MERWE	23rd Applicant
DAVID VAN DER MERWE	24th Applicant
LAWRENCE VAN ROOYEN	25th Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION IN THE NORTHERN CAPE	1st Respondent
THE HEAD OF THE DEPARTMENT OF EDUCATION IN THE NORTHERN CAPE PROVINCE	2nd Respondent
THE DISTRICT DIRECTOR: FRANCES BAARD DISTRICT OF THE DEPARTMENT OF EDUCATION IN THE NORTHERN CAPE	3rd Respondent

Coram: **Olivier J**

JUDGMENT

Olivier J:

[1.] The notice of motion in this application consists of two parts. Part B envisages the review of:

1.1 the decision of the third respondent, The District Director: Frances Baard District of the Department of Education in the Northern Cape Province, not to approve the applications for admission of learners, whose parents and guardians are cited as the third to twenty-fifth applicants, to the second applicant, The Northern Cape High School; and of

1.2 the decision by the first respondent, The Member of the Executive Counsel for Education in the Northern Cape Province, to dismiss the appeals[1] against the decisions of the third respondent.

[2.] It is not necessary or practical to include all of the names and particulars of the third to twenty-fifth applicants in this judgment. The names and particulars are set out in the founding affidavit.

[3.] The name of the ninth applicant was for some reason included in the heading of the notice of motion and cited in the founding affidavit, but when the time came for her to depose to an affidavit she indicated that she did not wish to become involved in the application.

[4.] For the sake of convenience, and also clarity, I will in what follows refer to the second applicant as the Northern Cape High School and, although applications for admission of learners to a school are

[1] In terms of section 5(9) of the **South African Schools Act**, 84 of 1996 (hereinafter referred to as "*the Act*")

actually made by a parent or guardian, I will where convenient refer to applications as those of the learners.

[5.] The relief requested in part A of the notice of motion is that, pending finalisation of the review, all those learners whose applications for admission to the Northern Cape High School for the 2016 academic year have not been refused by the third respondent, be allowed to attend that school as if the applications had been successful, that the third respondent be ordered to inform all those concerned accordingly and that the third respondent be interdicted from filling any of the vacancies at the Northern Cape High School caused by the refusal of those applications.

[6.] The School Governing Body of the Northern Cape High School, a body as envisaged in the Act, is the first applicant and the Head of the Department of Education in the Northern Cape Province is cited as the second respondent.

[7.] This application was initially brought urgently. Since then it has, however, been postponed twice, each time on the basis that wasted costs would be costs in the application, and answering and replying affidavits have been filed. The fact that the applicants may have initially brought the application urgently, and may have placed the respondents under pressure to file answering papers, only to postpone the application thereafter, is therefore of no relevance at this stage.

[8.] In his heads of argument, Adv Tshavhungwa, counsel for the respondents, made much of the fact that the replying affidavit was filed late, and without any attempt to seek condonation. There was no application to have it struck and it was never contended that the late filing of the replying affidavit had caused any prejudice to the respondents. At the hearing of this application I was informed that it had been agreed that that the replying affidavit could be admitted into evidence. It is clearly in the interests of justice, and more specifically of the children concerned, that this matter be disposed of as soon as possible, and on all available information.

[9.] The respondents filed an application for the admission of a supplementary answering affidavit. That application was based on the submission that the applicants had included new evidence in their replying affidavit.

[10.] At the hearing of this matter it was agreed that the supplementary affidavit could be accepted as evidence, but the submission that the replying affidavit contained new evidence also formed the basis of Mr Tshavhungwa's argument that the applicants had through such new evidence attempted to prove the authorisation of the deponent for the first two applicants, Mr Helena, to act on their behalf and to prove the *locus standi* of the 3rd to 8th and 10th to 25th applicants. The submission was that the resolution attached to the replying affidavit of Mr Helena, purporting to authorise Mr Helena to bring the application on behalf of the first and second applicants, and the affidavits by the 3rd to 8th applicants and the 10th to 25th applicants, annexed to the replying affidavit of Mr Helena

constituted evidence which should have formed part of the applicants' evidence in founding.

[11.] The resolution and the affidavits were annexed in response to points taken in the answering affidavit that Mr Helena's authorisation was disputed and that the persons cited as the 3rd to 8th and the 10th to 25th applicants were not in fact applicants in their own right.

[12.] The applicants were fully entitled to respond to those challenges in their replying affidavits. The contents of the resolution and of the further affidavits do not constitute new evidence. It constitutes a response to a challenge posed by the respondents.

[13.] In the founding affidavit Mr Helena made the clear and unambiguous averment that he had been duly authorised by the first and second applicants to depose to his affidavit. Although it is not strictly speaking necessary that a person be authorised to depose to an affidavit, as opposed to bringing an application, it is clear that what Mr Helena intended to convey was in fact that he had been authorised to act on behalf of those two applicants.

[14.] It is trite that a deponent who claims to be bringing an application on behalf of a juristic entity or *legal persona* need in founding only make an allegation to this effect and need not at that stage produce a resolution[2].

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[2] Compare **South West Africa National Union v Tjozongoro and Others** 1985 (1) SA 376 (SWA) at 381D – E; **Mall (Cape) (Pty) Ltd v Merino Ko-Operasie Bpk** 1957 (2) SA 347 (C); **Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund and Others** 2007 (1) SA 142 (N) para [4]

[15.] Such a deponent can therefore then, if that allegation is challenged, supply proof of authorisation by means of a replying affidavit. The purpose of a replying affidavit is precisely that, in other words to substantiate averments which have been disputed or challenged in the answering papers[3].

[16.] In any event, the manner in which the respondents have chosen to challenge Mr Helena's authorisation is misconceived. It has repeatedly been held that this should be done by challenging the authority of the attorney for the particular applicant through the mechanism provided by Uniform Rule 7[4].

[17.] The respondents' response to that averment by Mr Helena did in any event not constitute a proper challenge or a *bona fide* dispute. They did not allege that Mr Helena had not been properly authorised.

[18.] In his supplementary answering affidavit Mr Mogatle, deponent for the respondents, questioned "*when and where*" the resolution had been adopted. According to the heading of the resolution it was adopted on 18 August 2015, well before the application was lodged. Mr Tshavhungwa nevertheless raised the same question in argument. I am not sure if it was intended to suggest that the resolution may have been contrived after the attack on Mr Helena's

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[3] Compare **Standard Bank of South Africa Ltd v Sewpersadh** 2005 (4) SA 148 (C) at 159G
[4] Compare **Eskom v Soweto City Council** 1992 (2) SA 703 (W) at 706; **Ganes and Another v Telecom Namibia Ltd** 2004 (3) SA 615 (SCA) at 624B – 625A; **Unlawful Occupiers School Site v City of Johannesburg** 2005 (4) SA 199 (SCA) at 205J – 207G; **Umvoti Municipality v ANC Umvoti Council Caucus and Others** 2009 (2) SA 388 (N) at 394H – 396C

authority. If it indeed was, it was without any basis and most unfortunate. An insinuation like this constitutes a very serious attack on the integrity of others and should not be based on conjecture.

[19.] As regards the 3rd to 8th and the 10th to 25th applicants, Mr Helena has never claimed to have brought the application on their behalf or to depose to his founding affidavit on their behalf. Affidavits by all of them were annexed to Mr Helena's founding affidavit, and in those affidavits the particular applicants not only confirmed the contents of Mr Helena's affidavit, but also explicitly requested the relief in the notice of motion. They referred to themselves as applicants.

[20.] It is of some interest that the affidavits by these applicants, although annexed to the affidavit of Mr Helena, were styled *"Beëdigde verklaring"* and not, for example, as mere confirmatory affidavits.

[21.] Their recent affidavits, attached to the replying affidavit of Mr Helena, are to the same effect. They contain nothing new and they are styled in similar fashion.

[22.] The wording of the notice of motion also makes it abundantly clear that these persons are applicants in their own right, and in their personal capacities. It stated that not only the founding affidavit of Mr Helena and the annexures thereto, but also *"the affidavits by the 3rd to 25th applicants"*, would be used in support of the application.

It also informed the respondents that the Attorneys Engelsman Magabane Inc would represent "*the applicants*", in other words not only the 1st and 2nd applicants, but also all the other applicants.

[23.] There is therefore no merit in the submission that these persons are not really applicants, or that they were not really applicants when the application was brought, and that they have just been dragged into this litigation by the first two applicants. Once again, the authority of the attorneys to act for these persons has not been challenged in terms of Uniform Rule 7.

[24.] The fact that these applicants did not deal with the facts in their own affidavits, but rather chose to rely on the contents of the affidavits of Mr Helena, does not mean that their affidavits cannot be regarded as founding affidavits and that they are therefore not really applicants. These submissions by Mr Tshavhungwa are devoid of any merit. It must be kept in mind that Court proceedings "*is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side*"[5], all the more so in my view where the interests of children are at stake.

[25.] There is even less merit in the suggestion that the 1st or 2nd respondents are financing the legal costs of the other applicants, and in the threat that, if so, steps will be taken against them. There is not a hint of evidence to support this, and once again it is of some concern that an official in Mr Mogatle's position would make such a serious insinuation without any apparent justification.

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[5] Compare **R v Hepworth** 1928 AD 265 at 2007; **Take & Save Trading CC & others v Standard Bank of SA Ltd** [2004] JOL 12516 (SCA) para [3]

[26.] Getting back to the submission that the replying affidavit contains new evidence, it is in fact the respondents who are attempting to deal with new matter in their proposed further affidavit. This is also clear from Mr Tshavhungwa's submissions in paragraph 18 of his heads of argument. In his supplementary affidavit Mr Mogatle, attempts to explain that, contrary to what had been conveyed to the 1st and 2nd applicants in the 3rd respondent's letters dated 14 August 2015[6], the 15th and 22nd applicants had in fact been admitted to the Northern Cape High School. According to him the inclusion of their names in the list of learners who had not been admitted to the school was the result of a *"typing error"* which was only discovered after this application had already been launched. Significantly, however, he went on to state that the 3rd respondent then decided not to inform any of the applicants of this. It is not clear how the fact of this pending application could have justified such a decision. Those applicants incurred further costs in deposing to further affidavits, which they may possibly not have done had they known that their children had in fact been admitted.

[27.] What Mr Mogatle says in this regard appears to amount to hearsay evidence. It was probably not him that made the so-called typing error, and he has not explained who it was that discovered it. Be that as it may, Mr Mogatle annexed to his supplementary affidavit[7] a list of names of learners whose admission to the Northern Cape High School had been applied for and stated that those learners

[6] Annexures 'NCH 6' and 'NCH7' to the founding affidavit, and to which I will revert.
[7] Annexure 'OMS 1'

next to whose names there are no annotations have in fact been admitted to that school, including according to him the children of the 15th and 22nd applicants.

[28.] Adv Van Niekerk SC, counsel for the applicants, with reference to the very same list and the rest of the papers, illustrated quite convincingly that Mr Mogatle's explanation simply cannot be correct. Some of the other names on the list with no annotations next to them are the names of children whose applications for admission to the Northern Cape High School have indeed not been admitted to that school, while others with annotations have been admitted to that school. In view of this, and also in view of the conscious decision taken by the 3rd respondent to keep these two applicants, and this Court, in the dark about their alleged admission until now, I will in what follows proceed on the basis that the child of the 22nd applicant have not been admitted to the Northern Cape High School.

[29.] That the 1st respondent dismissed the appeal of the 22nd applicant without realising that the child had in fact been admitted, raises doubt over whether it could be said that the appeal was considered properly.

[30.] There is equally little merit in the submission on behalf of the respondents that the decision not to approve certain of the applications which had been accepted by the principal, did not affect the 1st or 2nd applicants and that they accordingly do not have *locus standi*.

[31.] Apart from the fact that the 1st and 2nd applicants would quite obviously have an interest in the admission of learners whose applications for admission have been accepted by the principal of the school in terms of the 1st applicant's approved admission policy, there is also the fact that, when informing the 1st applicant and the Northern Cape High School of the fact that the particular applications had been refused, the 3rd respondent purported to prohibit the 1st applicant and the school from filling the vacancies left by the non-admission of those learners, which would obviously be detrimental to both the 1st respondent and the school. This much was made abundantly clear in the founding affidavit. In fact, the 3rd respondent stated that *"The District Director will henceforth liaise with you in the filling of those vacancies"*.

[32.] Mr Tshavhungwa submitted that the 1st and 2nd applicants had not been entitled to file internal appeals. This, if correct, may affect their *locus standi* to apply for the review of the dismissal of their own appeals, but they would still have a direct and substantial interest in the review of the decisions taken in the appeals of the other applicants. Their admission policy, and their interest in having applications which have been accepted by the principal and submitted to the 3rd respondent properly considered, are concerned in this application.

[33.] This eventually brings me to the merits of the application. The 3rd to 8th and 10th to 25th applicants had all submitted more than one application for the admission of their children, to more than one

school, to avoid the possibility that a single application could fail and that such a child could then be without a school to attend. This is apparently a common practice.

[34.] As it turned out their applications for admission of their children to the Northern Cape High School were successful, to the extent that the school accepted their applications in terms of its admission policy, and submitted their applications to the Education Department[8] for them to be admitted to or be placed at the Northern Cape High School.

[35.] In the said letters dated 14 August 2015 the 3rd respondent informed the principal of the Northern Cape High School that these applications, amongst others, had not been approved. The reason advanced in terms of section 5(8) of the Act was that they had all instead been admitted to other schools, in respect of which they had also applied for admission, as already explained.

[36.] The applications of a number of other learners who had also submitted applications for submission to other schools, in addition to applications for admission to the Northern Cape High School were, however, approved and they were admitted to or placed at the Northern Cape High School.

[37.] The internal appeals against the decision/s not to approve the applications of the learners concerned in this matter were all unsuccessful.

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[8] In terms of section 5(7) of the Act (Section 9 of the **Northern Cape School Education Act**, 6 of 1996, contains similar provisions).

[38.] The reasons advanced by the first respondent for the dismissal of those appeals appear from a letter dated 31 August 2015. In the letter it was stated, *inter alia,* that the applications of those learners did not comply with the criteria set out in paragraph 7.3 of the applicable departmental circular and that their admissions to other schools were "*precisely because paragraph 7.3 found application*".

[39.] Paragraph 7.3 of the circular deals with certain criteria to be applied by schools in considering applications for admission, but the first respondent's letter did not explain in what respect/s any of these applications did not comply with those criteria, nor was it explained in what sense those criteria were applied in approving the applications for these learners to be admitted to other schools, but not the applications for their admission to the Northern Cape High School.

[40.] The first respondent went on to say that she failed to understand "*the concern of first or second choice*" and that "*The schools that the learners have been placed at... are indeed that they applied to and my office fails to understand how the Department is now infringing on their rights*".

[41.] The case for the applicants is that this is an indication that the Education Department had, as regards learners whose parents had applied to more than one school (including the Northern Cape High School) for their admission, arbitrarily decided to approve the

applications for admission to the Northern Cape High School in some of those cases, but in other cases not.

[42.] It is furthermore the case for the applicants that the fact that the applications in respect of these learners for admission to other schools were approved, cannot rationally be connected to the decision not to approve the other applications for their admission to the Northern Cape High School, and that the parents had been entitled to have each of their different applications considered individually, regardless of whether they had also applied for the admission of their children to other schools. If more than one application in respect of a particular learner qualified for approval, they should both or all have been approved, leaving it to the parents to decide which to accept.

[43.] At this stage the Court is only concerned with an interdict for temporary relief, pending the finalisation of the review application. The requirements for such an interdict are trite. The applicant must make out a case, at least *prima facie* (even though it may be open to some doubt) that it has a protectable right. There must be a well-grounded apprehension of harm. The balance of convenience must favour the granting of the interdict and there must be no other satisfactory remedy available[9].

[44.] All the applicants have to show is a *prima facie* right to have the decisions reviewed. Even if it is open to a measure of doubt, it will still be sufficient, but the doubt concerning the right may cause the

[9] See **Setlogelo v Setlogelo** 1914 AD 221 at 227

Court, in the exercise of its discretion in deciding whether to grant the interdict or not, to place more weight on the issue of the balance of convenience[10].

[45.] In the present matter though, I have very little doubt that such a right exists, in other words that the applicants have a reasonable prospect of success in an application for the review of these decisions.

[46.] I have no doubt that the decision to either approve or not approve the admission of a learner to a specific school constitutes administrative action[11]. It in my view could clearly *"materially and adversely affect(s) the rights or legitimate expectations of"* of learners and their parents and therefore *"must be procedurally fair"*[12].

[47.] To say that one application was not approved because the other was approved, in other words the reason advanced by the 3rd respondent in terms of section 5(8) of the Act, does not in my view constitute a rational reason for either of those decisions, in other words the decision to refuse the one and the decision to approve the other[13]. It begs the question why the one was approved and the other not.

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[10] See **Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd and Others** 2001 (3) SA 344 (NPD) at 353F-354B

[11] Compare **MEC for Education, Gauteng Province, and Others v Governing Body, Rivonia Primary School and Others** 2013 (6) SA 582 (CC) para [60] (There is not, in my view, reason to distinguish that case on the basis that it concerned a decision to admit a learner, as opposed to a decision not to admit a learner)

[12] See section 3(1) of **The Promotion of Administrative Justice Act**, 3 of 2000.

[13] As was explained in **Minister of Home Affairs and others v Scalabrini Centre, Cape Town and others** [2013] 4 All SA 571 (SCA) para [65] *"rationality entails that the decision is founded upon reason – in contra-distinction to one that is arbitrary"*.

[48.] If the system allows more than one application per learner, then it would in my mind follow logically that each of those applications would have to be considered individually, and regardless of the other application/s, to decide whether it complied with the criteria for admission to a particular school.

[49.] An approach that disqualified one such an application simply because another has already been found to comply with those criteria, would in my view indeed be arbitrary and not rationally connected to the purpose of the process or decision envisaged in section 5 of the Act, which enjoins the Department to consider each and every application individually.

[50.] It would also not be rationally connected to the Department's own requirements, as contained in the said circular. Paragraph 12.8 thereof provides that "*After the receipt of the approval list of placements from the District Director, each school must*" inform the successful applicants, who in turn "*must confirm their acceptance of a place at the school within 7 school days of being notified*".

[51.] In my view Mr Van Niekerk was correct in his submission that this provision necessarily envisages and implies a choice which the particular applicant then has to make between more than one approved application in respect of different schools.

[52.] It cannot envisage a situation where only one application has been made and approved, because then that successful applicant would not have any option but to accept. This is so because section 3(1) of

the Act makes school attendance compulsory until the age of 15 years is reached, or until the year in which the child reaches grade 9, whichever comes first. It would appear that all the applications concerned here were for admission of children to grade 8 and that as far as could be discerned from those application forms that are available, school attendance would in 2016 still be compulsory for those children, with the possible exception of the 23rd applicant's child, who has apparently already turned 15. It is in any event inconceivable that a person would apply for admission of a child to a single school and, when it is approved, have to decide whether to accept it or not.

[53.] The attitude adopted by the respondents, and especially by the 1st respondent, that a parent who makes more than one application would not have the right of preference, and would not be entitled to prefer one school over the other, would make a mockery of the provisions of paragraph 12.8 of the Department's own circular.

[54.] It would also on the face of it be inconsistent with the provisions of section 5(6) of the Act, which provides that the Head of Department "*must take into account the rights **and wishes** of the parents of such learner*" when determining the placement of the learner (My emphasis).

[55.] Mr Tshavhungwa, in his heads of argument, made the point that the standard application form does not elicit information regarding an order of preference that the applicant may have. The answer to this is that it would as a matter of logic not contain a question to this

effect, for the simple reason that the contents of the form provide for only one application to one school.

[56.] This could, in any event, not be an insurmountable obstacle. It can, as argued for the applicants, be overcome by approving all applications complying with the prescribed criteria, leaving it to the parents to exercise a choice between the different options presented by the approval of the admission of a particular learner to more than one school.

[57.] Should this present a problem in the admission of learners to schools, logistically or otherwise[14], it would have been the department's duty to either provide a mechanism whereby parents could, when submitting multiple applications, indicate their preferences between those schools or to inform parents that, should they submit applications for admission to different schools, only one of those applications would be approved.

[58.] Although it certainly does not appear from the papers, Mr Tshavhungwa made the somewhat startling submission that the screening of applications are done manually by officials of the Department, that it may therefore happen that an official may approve an application to a particular school while unaware of the existence of further applications in respect of the same child and that, when another application in respect of the same child is thereafter considered, it would be refused on the basis that the child had already been admitted to a different school. If this really

[14] Not that such a complication was really raised and explained in the respondents' papers.

is how applications are considered, it would mean that it is a completely random process that would determine which of the applications is approved. It would depend solely on which one comes up for consideration first, and the other/s would then be refused simply because they came up for consideration at a later stage. There can hardly be a better example of arbitrary decision-making.

[59.] In his answering affidavit Mr Mogatle alluded to the responsibility *"to ensure economic use of resources"* and stated that the respondents had to *"ensure an evenly spread of children so that there can be adequate number of learners at specific schools to justify the costs of operating such schools and apportioning financial resources for such a cause"*. Mr Tshavhungwa also alluded to the possibility that other schools may be operating at half of their capacity, apparently suggesting that the children of the 3rd to 25th applicants were placed in those schools to raise the numbers of learners there. Neither the 3rd respondent nor the 1st respondent attempted to justify their decisions by saying that the children of the 3rd to 25th applicants were placed at other schools to achieve this goal; understandably so, because the filling of the resultant vacancies (envisaged in the 3rd respondent's letters of 14 August), most probably with learners who would otherwise have been admitted to other schools, would have left the number of learners in grade 8 at the Northern Cape High School, and would have defeated the purpose of such an exercise. The number of learners at the other school/s would also not really have been increased,

because learners who would otherwise probably have attended those schools had they not been admitted to the Northern Cape High School, would then be in the latter school.

[60.] Mr Tshavhungwa also alluded to the preamble of the Act, and the fact that the past system of education which was based on racial inequality and segregation was done away with. He did not, however, explain the relevance of this fact in the context of this application, neither did he explain in what way that fact, or in fact any objective of the Act, would justify the non-approval of these applications. Needless to say this was also never raised by either the 3rd or the 1st respondent as a reason for their decisions.

[61.] It is not in my view necessary, nor is it really possible with the limited time available for this judgment, to go into the merits or demerits of each and every one of the applications and appeals. I will therefore make only one or two remarks in this regard.

[62.] In the first place the Northern Cape High School is a dual medium school, while some of the schools where the Department has seen fit to place these learners are not. It is easy to understand that some parents may prefer to have their children educated in the environment of such a school, where education is available in both the English and Afrikaans languages and where the other learners will be a mixture of English and Afrikaans speaking children. At the same time those parents, who incidentally have to submit applications for admission by a certain deadline, would not want to run the risk of their children in the end not being admitted to that

school, but not having applied for admission to another school as a backup. Where that other school does not provide dual medium education it would quite clearly, and as a matter of logic, be that parent's second choice.

[63.] And so there may also be other reasons why a parent, who submits applications in respect of more than one school, would nevertheless prefer the one over the other.

[64.] Some such considerations may for example be found in the criteria set out in paragraph 7.3 of the departmental circular, and to which I have already alluded. They concern the area where the learner resides, whether he/she has a sibling that attends the specific school and whether a parent of the learner is perhaps an educator at the particular school.

[65.] Any of these factors may cause a parent to prefer one school over another, but none of them would limit such a parent to only one application for admission.

[66.] That a parent has a choice of which school a child is to attend, is in fact well recognised[15]. A parent would be better equipped than any of the respondents to evaluate a child's academic strengths and preferences, and a child's interests and talents.

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[15] Compare **Krugel v Krugel** 2003 (6) SA 220 (T) para [9]; **Governing Body, Gene Louw Primary School v Roodtman** 2004 (1) SA 45 (C) at 51 – 52

[67.] Furthermore everyone has the right to basic education[16], and insofar as the choice of school may later in life impact on children's *"right to choose their trade, occupation or profession freely"*[17], this too would be a reason why a parent should have the right to, at the very least, have a preference of one school over the other considered. Then there is also the overriding right of a child that his or her *"best interests are of paramount importance in every matter concerning the child"*[18]. To say that this matter concerns these children would be stating the obvious.

[68.] Mr Van Niekerk correctly conceded that no right is an absolute right. If it is, however, in a particular case interfered with, that interference must be *"reasonable and justifiable"*[19]. Such justification would then obviously have to appear from the reason/s advanced for limiting that right.

[69.] The son of the 3rd applicant, Mr Dean Ballantyne, for example grew up in a house where his father is English speaking and his mother is Afrikaans speaking. The school where the Department placed the child is not a dual medium school and no reason has been advanced for why it was decided to place the child there. As far as this consideration is concerned the two schools quite obviously differ and, whatever the merits or demerits may be of dual medium schooling, the parents of this child at the very least have the right to

[16] Section 29(1) of the **Constitution of the Republic of South Africa**, 108 of 1996
[17] Section 22 of the **Constitution**
[18] Section 28(2) of the **Constitution**
[19] Section 36(1) of the **Constitution**

prefer the one school over the other on the ground of this difference.

[70.] The same applies in the case of the 4th applicant, Mrs Karen Rheeder. She would prefer to have her child in a dual medium school, but this child too was placed in a school which provides single medium education. In this case the Northern Cape High School is only 500m from the child's home, while the school where she has been placed is much further away.

[71.] Mr Mogatle says that the application forms do not elicit information regarding the distance between the school and the place of residence. Surely the Department can be expected to know the location of the different schools and neighbourhoods in Kimberley, otherwise it would not be able to enforce paragraph 7.3 of its own circular. The residential addresses of the learners for whom application is made appear on the application forms, as do their preference of a language of education.

[72.] In fact, Mr Tshavhungwa submitted that, in approving some applications and others not, the 3rd respondent took cognisance of the contents of the application forms and of, *inter alia*, the distance between the place of residence and the school. This would not explain the decision in respect of, *inter alia*, the 4th applicant's child. Mr Van Niekerk drew my attention to a number of other instances where even children from outside Kimberley were admitted to the Northern Cape High School by the 3rd respondent, instead of the children of the 3rd to 25th applicants, who reside in Kimberley.

Furthermore the 3rd respondent did not, in stating the reason for not admitting certain learners to the Northern Cape High School, advance any of the particulars provided in the 3rd to 25th applicants' applications as a ground for taking that decision.

[73.] The son of the 8th applicant, Mr Luke Aiyer, has been placed at the Northern Cape High School, but the application in respect of their daughter to also be placed there, was not approved and she was placed elsewhere. This clearly calls for a better explanation than that proffered by the 3rd and 1st respondents. The departmental circular lists the fact that a sibling is a learner at a school a relevant factor in considering an application, and at the very least one would expected an explanation of why the 8th applicant's daughter was nevertheless refused admission.

[74.] Another valid consideration which could influence a parent in deciding upon a school of preference for a child would be the choice of subjects offered by a particular school. Mr Helena's averment that the Northern Cape High School offers subjects which are not available at some of the other schools where the Department has placed these learners, was not disputed. Mr Mogatle's response that all schools in the province may be "*well equipped with the necessary resources and facility to create a conducive learning environment to enable the children to realise their individual dreams*", whatever this may mean, does not constitute a dispute of fact in respect of Mr Helena's averment in this regard.

[75.] In my view there the applicants at the very least have a *prima facie* right to have their application for review adjudicated.

[76.] The applicants' right to have these decisions reviewed would be rendered meaningless if, pending the review, the children had to go to the schools where the Department has seen fit to place them. Should the review eventually succeed, and the decisions be set aside, the children will in all probability already be well into the 2016 academic year, and for them to then be moved to the Northern Cape High School would cause irreparable harm. Not only would it result in unnecessary costs, for example of school uniforms, but also there is no indication that, where applicable, they would then be able to catch up with the work already done on subjects not offered at the other school and which they would want to take.

[77.] As it is the 2015 school year is almost at its end, as is the final court term for this year, and it is highly unlikely that the review application will be dealt with until well into the 2016 academic year.

[78.] The position would be even worse if the Department had then, in the meantime, gone and filled the vacancies left by the non-approval of these applications. This would then in any event make it impossible for the particular learners to move to the Northern Cape High School[20], even though the review application may have been decided in their favour. Should those vacancies not be filled, on the other hand, the Northern Cape High School would suffer harm, as explained by Mr Helena. In fact, Mr Mogatle has not

[20] It is inconceivable that learners who may in the meantime have been placed there to fill the vacancies, would in such a case have to leave that school.

disputed any of the examples of harm and prejudice pointed out by Mr Helena.

[79.] As regards the balance of convenience there can be no doubt that it favours the applicants. Mr Mogatle has not pointed out any harm or inconvenience that would be suffered by any of the respondents should the interim relief be granted.

[80.] The applicants have exhausted their right of internal appeals. It has not been suggested on behalf of the respondents that there is another way in which the *prima facie* right could be protected.

[81.] Mr Van Niekerk lastly argued that, because this Court is the upper guardian of all children, the orders envisaged in Part A of the notice of motion should be amended and extended to also provide other parents whose children were refused admission in terms of the 3rd respondent's letters of 14 August with the option of having their children placed in the Northern Cape High School. Tempting as this may be, I think it would not be appropriate. The applications that those parents had made for admission of their children to this school are not part of these papers, and the respondents have not had the opportunity to deal with them specifically. It is not even clear from the founding affidavit of Mr Helena whether all of them submitted appeals.

[82.] Mr Van Niekerk, in the alternative, suggested that the relief be restricted to only the applicants involved in this application. I intend doing this.

[83.] As regards costs there is no reason why it should not follow the result. The applicants' attorney, in a letter dated 9 September 2015, informed the respondents of the intended review application and requested them *"to place the affected children in Northern Cape High School, pending the outcome of the review application"*. Other than an acknowledgement of receipt the letter elicited no further response by any of the respondents, leaving the applicants with no choice but to apply for this interim relief.

[84.] I therefore make the following orders, which are to apply within interim effect pending the finalisation of the review application envisaged in part B of the notice of motion:

1. **THE RESPONDENTS ARE ORDERED TO ALLOW THOSE LEARNERS WHO ARE THE CHILDREN OF THE 3RD TO 8TH, THE 10TH TO 14TH AND THE 16TH TO 25TH APPLICANTS AND WHOSE APPLICATIONS FOR ADMISSION TO THE NORTHERN CAPE HIGH SCHOOL FOR THE 2016 ACADEMIC YEAR WERE NOT APPROVED BY THE 3RD RESPONDENT, AS REPORTED IN THE 3RD RESPONDENT'S LETTERS DATED 14 AUGUST 2015, TO ATTEND THE SAID SCHOOL AS IF THOSE APPLICATIONS HAD BEEN GRANTED.**

2. **THE 3RD RESPONDENT MUST NOTIFY THE 3RD TO 8TH, THE 10TH TO 14TH AND THE 16TH TO 25TH APPLICANTS OF THIS ORDER WITHIN 10 (TEN) DAYS HEREOF.**

3. THE 3RD RESPONDENT IS INTERDICTED AND PROHIBITED FROM FILLING ANY VACANCY AT THE SAID SCHOOL FOR LEARNERS IN GRADE 8 FOR THE 2016 ACADEMIC YEAR AND WHICH VACANCY IS THE RESULT OF THE 1ST AND 3RD RESPONDENTS' DECISIONS WHICH ARE THE SUBJECT OF THE RELIEF SOUGHT IN PART B OF THE NOTICE OF MOTION.

4. THE COSTS OF THE APPLICATION IN PART A ARE TO BE PAID BY THE RESPONDENTS, JOINTLY AND SEVERALLY, THE ONE TO PAY THE OTHER TO BE ABSOLVED *PRO TANTO*.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the Applicants:	ADV J G VAN NIEKERK SC
Instructed by:	ENGELSMAN MAGABANE INC
For the RespondentS:	ADV T C TSHAVUNGWA
Instructed by:	MJILA & PARTNERS